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548307—43

In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 216

THE PEOPLE OF PUERTO RICO, ON BEHALF OF THE ISABELA IRRIGATION SERVICE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the district court (R. 39–50) is not reported. The opinion of the circuit court of appeals (R. 58–68) is reported in 134 F. 2d 267.

JURISDICTION

The judgment sought to be reviewed was entered on March 11, 1943 (R. 68). A petition for rehearing was denied April 13, 1943 (R. 68). A

petition for a writ of certiorari was filed July 31, 1943, within the time as extended by Mr. Justice Frankfurter (R. 69). The jurisdiction of this Court is invoked under section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether petitioner is entitled to recover damages from the United States for the loss of the right to impose future irrigation assessments on lands condemned by the Government and for the resulting loss of revenue to the "Isabela Irrigation Fund" and the People of Puerto Rico.

2. Whether petitioner is entitled to compensation for the cost of extending its irrigation system to other lands.

STATUTES INVOLVED

The relevant statutes providing for the construction and financing of the Isabela Irrigation Service are set out in the appendix to petitioner's brief (Pet. 55–101).

STATEMENT

The United States on September 6, 1939, instituted condemnation proceedings (R. 1–4), accompanied by a declaration of taking (R. 5–6), to acquire 1,877.39 acres of land in Puerto Rico for the establishment of an Army Air Base at Punta Borinquen (R. 2, 19). Included within the land condemned were 592 acres lying within the Isabela

Irrigation Service (R. 27–29, 44), an irrigation district organized in 1919 by the legislature of Puerto Rico for the purpose of providing an irrigation system for the northwestern portion of the Island (Pet. 56, 61). Funds for the establishment and operation of the irrigation service had been obtained from Puerto Rican bonds secured by the good faith of the insular government and by the revenues to be derived from annual assessments on the lands included in the irrigation district (R. 39–41, 59). Under later changes in the statutes the assessment provisions of the original plan were suspended and water was no longer furnished outright to members of the project. Instead water was sold to users. In place of the assessments a special annual tax of $1.00 per acre was substituted, entitling landholders within the project to buy water at a lower rate than that paid by landholders outside the district. (R. 39–44, 59–60; Pet. 91–101.)

On April 5, 1940, the People of Puerto Rico, on behalf of the Isabela Irrigation Service, filed an answer in these proceedings, alleging that it was entitled to compensation from the United States for the "taking" of certain "tangible" and "financial" items, as follows (R. 9–12):

Tangible Items:	
Group 1:	
1. Land and right-of-way	$1,826.07
2. Canals and structures	21,366.00
3. Electric power lines	5,701.00
	28,893.07

Tangible Items—Continued.	
Group 2:	
1. Aguadilla Canal. "The total cost of the Aguadilla Canal is placed at $80,000, approximately. About ⅕th part of it could have been saved if built to feed water for only the lands that now came to be served after diminution of extent of irrigation district thru the withdrawal of land within the site of the Puerto Rican Air Base. The excess investment is therefore"	$16,000.00
Group 3:	
1. New Conveyances (new pipe to be run along eastern boundary of Air Base)	19,500.00
Total tangible items	64,393.07
Financial Items:	
Group A:	
1. Loss of income, new conveyances	199,000.00
Group B:	
1. Advances for payment of interest on bonded debt	114,374.19
2. Arrears in payment of amortization	64,839.60
Total financial items	378,213.79
Grand total of all items	442,606.86

It is thus to be noticed that of these three groups of assertedly "tangible" items, only Group 1, valued at $28,893.07, covered tangible property of the claimant actually taken in these proceedings. Groups 2 and 3, though classified by the claimant as "tangible," related not to property actually taken but to damages assertedly suffered through the taking in connection with its remaining property not actually taken—in short, "severance damages."

Subsequently the district court ordered the People of Puerto Rico to file a statement of particulars with respect to the claim for "financial items" (R. 21–22). Accordingly, on January 26, 1942, a statement was filed which modified the

original claim in the following manner (R. 23–24):

> * * * the theory upon which the claim for financial items is contained in the answer of The People of Puerto Rico, as modified herein is as follows:
>
> (a) Claim covering levies in arrears as of June 30, 1936, in the amount of $559.91; claim on the theory that the amount of such claim is an encumbrance on the property condemned, and should, therefore, be paid out of the money on deposit as market value of the land.
>
> (b) Claim covering levies in arrears from July 1, 1936, to the date of the taking, September 6, 1939, in the amount of $58.75 based on the theory that the amount thereof is a burden or encumbrance of the property taken, and should, therefore, be paid out of the money on deposit as market value of the land.
>
> (c) *Claim for damages suffered as a direct and inevitable result of readjusting the irrigation district of Isabela by including new land in the same amount as that taken under these proceedings, and the construction and establishment of new equipment therein so that the service may continue in operation in conditions analogous to those prior to the taking.*[1] The amount of this claim to be computed on the basis of the present cost of the required installation, including constructions of canals, laterals,

[1] Italics are supplied throughout this brief.

gates, equipment, etc.; less the depreciation of such installation for a number of years equivalent to that in which the severed installation had been in use; less the amount of $64,393.07, allowed by the court as present recoverable value of the severed installation; namely: $114,716.

It is the theory of The People of Puerto Rico that the resulting amount under this item after the proper reduction is approximately $114,716 and should be paid as an additional compensation by the United States.

On February 28, 1942, the United States and the People of Puerto Rico stipulated (R. 29, 33–34):

1. That the sum of $64,393.07 shall be in full satisfaction of and represents the just compensation for the taking by the United States of the property of said defendant described in its answer filed in this proceeding on April 5, 1940 as "Tangible Items" and fully described hereinabove in this stipulation.

2. That this court is hereby authorized and petitioned to enter a deficiency judgment in accordance with that portion of the defendant's answer designated as "Tangible Items" adjudging just compensation for the taking of said tangibles to be the amount of $64,393.07.

3. That the defendant accepts as full and just compensation for the taking of the tangibles and damages to the interests set forth under that portion of its answer in

this proceeding which is designated as "Tangible Items" the sum of $64,393.07 provided that in the deficiency judgment which may be entered pursuant to this stipulation jurisdiction in this court be expressly retained for the purpose of passing upon and adjudicating the liability of the petitioner for the payment of the amounts claimed in the defendant's answer as "Financial Items", *as modified and substituted by paragraph (c) of their statement of particulars* * * *.

The court thereupon entered an order reciting that the claims to levies in arrears in the amounts of $559.91 and $58.75 described in the statement of particulars had been satisfied from the fund on deposit and that (R. 36–37):

> Whereas, a stipulation has been entered into between the United States of America and The People of Puerto Rico by which the sum of $64,393.07 has been agreed upon as the reasonable market value of the lands and structures belonging to the Isabela Irrigation Service which were taken and destroyed by the United States in this proceeding;
>
> Whereas, it appears from the incidents above recited as well as from the pleadings on file in this proceeding that a preliminary issue has been raised by The People of Puerto Rico, to wit: *Is The People of Puerto Rico entitled to receive compensation in this proceeding as a matter of law for the estimated amount of the cost of sup-*

plying irrigation to new lands of an equivalent area to those withdrawn from the irrigation service as a result of this proceeding?

Now, therefore, it is hereby ordered that the above issue be set down for hearing on the twenty-seventh day of March, 1942 at 9:30 A. M. at which time both parties may fully present whatever law or facts they may have in support of their respective positions.

In a deficiency judgment filed also on February 28, 1942, the court awarded $64,393.07 "in satisfaction of all damages and as just compensation for the taking of all items included under the term 'Tangibles' in the answer filed by said defendant" and reserved "jurisdiction to determine the validity and amount of the additional claim" (R. 37–39).

The issue thus reserved was thereafter submitted to the district court which held that the cost of relocation was not a proper item for compensation (R. 39–50), and accordingly dismissed petitioner's claim in the additional amount of $114,716 (R. 51). The circuit court of appeals affirmed (R. 58–68) and denied a subsequent petition for rehearing (R. 68). Petitioner now seeks certiorari.

ARGUMENT

1. Petitioner contends (Pet. 1, 2, 14, 15, 16, 20-21, 27, 35, 36–45, 47) that it is entitled to recover damages from the United States for the loss of

the right to impose future irrigation assessments on the lands condemned by the Government and for the resulting loss of revenue to the "Isabela Irrigation Fund" and the People of Puerto Rico. There are three answers to this contention.

In the first place, the People of Puerto Rico, by a stipulation entered into with the United States on February 28, 1942 (R. 29–34), limited its claim for additional compensation against the United States to "damages suffered as a direct and inevitable result of readjusting the irrigation district of Isabela by including new land in the same amount as that taken under this proceeding" (R. 32, 23). By this stipulation and the court order of the same date the issue remaining for trial was thus specifically limited to the following question: "Is the People of Puerto Rico entitled to receive compensation in this proceeding as a matter of law *for the estimated amount of the cost of supplying irrigation to new lands of an equivalent area* to those withdrawn from the Irrigation Service as a result of this proceeding?" (R. 36–37). This question as to relocation damages being agreed upon as the *sole* issue, petitioner is barred from reviving the fully abandoned and distinctly separate issue raised in its original answer (R. 12) as to its right to recover for the loss of future assessments and of other revenues from the lands condemned. *Gage* v. *J. S. Smyth Mercantile Co.*, 160 Fed. 425, 431

(C. C. A. 8); *State* v. *Superior Court,* 151 Wash. 413, 276 Pac. 98 (1929).

In the second place and irrespective of the stipulation, the claim for loss of future assessments and revenue is foreclosed by the holding of this Court in *Mullen Benevolent Corp.* v. *United States,* 290 U. S. 89, 94–95; see also *United States* v. *City of Buffalo,* 54 F. 2d 471, 474 (C. C. A. 2), certiorari denied, 285 U. S. 550; 47 Harv. L. Rev. 706. Petitioner concedes (Pet. 21) that the bonded indebtedness of the Irrigation District was not an actual lien under Puerto Rican statutes at the time the proceedings were instituted and title passed to the United States under the declaration of taking (Cf. R. 65–66). There being no lien, the condemnation proceeding at most frustrated action by the People of Puerto Rico to replenish the assessment fund. "Frustration and appropriation are essentially different things." *Omnia Co.* v. *United States,* 261 U. S. 502, 513; *United States ex rel. T. V. A.* v. *Powelson,* No. 3, October Term, 1942, decided May 17, 1943.

In the third place, in determining just compensation for the lands taken, the awards were duly enhanced by "the availability of irrigation" (R. 47, 55). Those awards have been paid into court. They stand in place of the land. *People of Puerto Rico* v. *United States,* 131 F. 2d 151–152 (C. C. A. 1), certiorari denied, March 15, 1943, Nos. 714–715, October Term, 1942. Any contractual claim

which the People of Puerto Rico may have had against the property owners must now be asserted against the awards. How the awards are distributed among the various claimants is no legal concern of the condemnor. *United States* v. *Dunnington*, 146 U. S. 338, 351; *St. Paul* v. *Certain Lands in the City of St. Paul, Minn.*, 48 F. 2d 805 (C. C. A. 8).

2. In the stipulation of February 28, 1942, petitioner agreed (1) to accept $64,393.07 in satisfaction of its claim for "tangible items"—the district's lands and rights-of-way, canals and structures, electric power lines, *severance damages to the Aguadilla Canal, the cost of running a new pipe line to connect up the remaining system, etc.* (R. 30–31, 33–34, 10–11), and (2) to limit its claim for additional compensation to matters asserted in paragraph 3 (c) of its bill of particulars—the cost "of readjusting the irrigation district of Isabela by including new land in the same amount as that taken" (R. 33–34, 23–24, 45–46).

That the Government is under no obligation to pay for the expense of replacing or relocating a business on another site in lieu of the land condemned is well settled.[2] *Gershon Bros. Co.* v. *United States*, 284 Fed. 849 (C. C. A. 5); *Potomac*

[2] The circuit court of appeals' decisions which petitioner asserts establish a conflict with the decision herein (Pet. 23–24), presumably on this point, do not do so because they involved claims for severance damages. Petitioner has been fully compensated for severance damages, as shown subsequently in the text.

Electric Power Co. v. *United States,* 85 F. 2d 243, 249 (App. D. C.); *Futrovsky* v. *United States,* 66 F. 2d 215, 216–217 (App. D. C.). Nor is the Government liable for more than the fair market value of the land condemned where the condemnee is unable to find another suitable site. *Mitchell* v. *United States,* 267 U. S. 341, 343, 345; *Sirio Match Co.* v. *United States,* 81 C. Cls. 427, 438 (1935); cf. *Deepe* v. *United States,* 103 Colo. 294, 86 P. 2d 242 (1938). So-called damages of this type are consequential; there is no taking by the United States of the items claimed; and they have no relation to the fair market value of the property. *Bothwell* v. *United States,* 254 U. S. 231, 233; *Joslin Co.* v. *Providence,* 262 U. S. 668, 675–676; *Wm. Wrigley, Jr., Co.* v. *United States,* 75 C. Cls. 569, 584–585 (1932); *Howard Co.* v. *United States,* 81 C. Cls. 646, 652, 654 (1935).

The district court so held and rejected petitioner's sole remaining claim of $114,716 for relocation costs (R. 49–50). On appeal petitioner did "not seriously contend that the cost of readjusting the irrigation system is compensable" (R. 62). And in its petition in this Court the People of Puerto Rico apparently make no claim whatever for relocation costs as such.

Instead, petitioner attempts to inject into the case a new and additional claim for severance damages (Pet. 2–3, 15–17, 26–34). As has already been pointed out (*supra,* pp. 4, 11), server-

ance damages were included in the $64,393.07 awarded petitioner for "tangible items"—groups 2 and 3 being pure "severance" (R. 11, 31, 34, 36, 38). Having by stipulation of February 28, 1942, limited its claim to additional compensation to item 3 (c)—the cost of relocation—and having agreed to accept $64,393.07 for "tangible items" including "severance," petitioner is in no position to shift its theory in the appellate courts and claim additional "severance damages" (cf. R. 64).

Furthermore, an analysis of the severance claim shows it to be without merit. This claim is based primarily on loss of revenue—the inability to levy future assessments against these particular lands, and to sell water to private users, in short, a general lessening of the earning capacity of this irrigation project (Pet. 2–3, 15–17, 26–34). But such a claim is not compensable. *Mullen Benevolent Corp.* v. *United States,* 290 U. S. 89; cf. *Deepe* v. *United States,* 103 Colo. 294, 86 P. 2d 242 (1938). The mere fact, if it be a fact, that the earning capacity of petitioner's "public utility" (cf. R. 48) was somewhat curtailed by the taking of private lands within the irrigation district does not give rise to a claim for damages. "Injury to a business carried on upon lands taken for public use * * * does not constitute an element of just compensation." *Joslin Co.* v. *Providence,* 262 U. S. 668, 675; *Mitchell* v. *United States,* 267 U. S. 341, 345. And, contrary to petitioner's contention

(Pet. 15–17, 26–34) such claims are not to be indirectly allowed as "severance damages." If the complete destruction of a business enterprise conducted in connection with the land condemned is not compensable, *a fortiorari* no recovery may be had for a partial interference. *Oakland* v. *Pacific Coast Lumber & Mill Co.*, 171 Cal. 392, 153 Pac. 705 (1915).

As applied in the case at bar, the rule is clearly sound and practical. Here the petitioner has stipulated as to the full value of its tangible properties taken by the United States and as to the actual damage to the severed canal system (R. 34, 38). If the United States were required also to pay additional readjustment or "severance" damages it would be paying more than just compensation; the Government would, in fact, be providing the irrigation district with a gratuity. This is so because if the district desires to extend its system to new lands it will have available all of the money obtained from the Government in lieu of its old lands, rights-of-way, canals, equipment, etc., embraced within the property condemned. "What claimant is asking is that it be paid the fair value of that part of its distribution system located on the land taken, and that it be paid also the cost of constructing another distribution system in a different land area. It is not entitled to both." (R. 50, 62.)

CONCLUSION

The decision of the court below is correct and presents no conflict of decisions. The petition for a writ of certiorari should be denied.

Respectfully submitted.

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